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Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID C. QUARZENSKI,

Petitioner,

v.

THE STATE OF WISCONSIN,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin, District I

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires ambiguous language in a plea agreement to be construed against the government, and in accordance with the defendant's reasonable understanding of the agreement.

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OPINION BELOW

The Wisconsin Court of Appeals issued its published opinion in this case on August 22, 2007. A copy of that opinion is attached as Appendix A. The Wisconsin Supreme Court issued a one-page order denying discretionary review on November 5, 2007. A copy of that order is attached as Appendix B.

JURISDICTION

The Wisconsin Supreme Court denied discretionary review on November 5, 2007. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATE STATUTORY PROVISIONS INVOLVED

Wisconsin Statutes § 973.01, "Bifurcated sentence of imprisonment and extended supervision," provides in pertinent part:

(1) Bifurcated sentence required. Except as provided in sub. (3), whenever a court sentences a person to imprisonment in the Wisconsin state prisons for a felony committed on or after December 31, 1999, or a misdemeanor committed on or after February 1, 2003, the court shall impose a bifurcated sentence under this section.

(2) Structure of bifurcated sentences. A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision under s. 302.113. The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision. An order imposing a bifurcated sentence under this section shall comply with all of the following:

(a) Total length of bifurcated sentence. Except as provided in par. (c), the total length of the bifurcated sentence may not exceed the maximum period of imprisonment specified in s. 939.50(3), if the crime is a classified felony, or the maximum term of imprisonment provided by statute for the crime, if the crime is not a classified felony, plus additional imprisonment authorized by any applicable penalty enhancement statutes.

Wisconsin Statutes § 302.113 "Release to extended supervision for felony offenders not serving life sentences," states in pertinent part:

(1) An inmate is subject to this section if he or she is serving a bifurcated sentence imposed under s. 973.01.

(2) Except as provided in subs. (3) and (9), an inmate subject to this section is entitled to release to extended supervision after he or she has served the term of confinement in prison portion of the sentence imposed under s. 973.01. . . .

. . . .

(9)(am) If a person released to extended supervision under this section violates a condition of extended supervision, the reviewing authority may revoke the extended supervision of the person. If the extended supervision of the person is revoked, the person shall be returned to the circuit court for the county in which the person was convicted of the offense for which he or she was on extended supervision, and the court shall order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence. The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the sentence. The court order returning a person to prison under this paragraph shall provide the person whose

extended supervision was revoked with credit in accordance with ss. 304.072 and 973.155.

STATEMENT OF THE CASE

A. Proceedings in the State Trial Court

On August 30, 2000, the State of Wisconsin charged Quarzenski with possession with intent to distribute marijuana and possession of drug paraphernalia. App. A at 3. In April 2001, while that case was still pending, Quarzenski was again arrested and charged with delivery of marijuana. *Id.* Quarzenski retained private counsel to represent him on these two cases. *Id.*

A month later, the State of Wisconsin filed additional charges, including delivery of a controlled substance to a minor, possession of marijuana, and three counts of second-degree sexual assault. *Id.* at 3. A state public defender was appointed to represent Quarzenski on this third case. *Id.*

In July 2001, the parties negotiated a plea agreement that would dispose of all pending charges. App. A at 3. Under the agreement, Quarzenski would plead guilty to one count of possession with intent to deliver marijuana, one count of delivery of marijuana, one count of violation of the terms of his bond, and one count of second-degree sexual assault. *Id.* The State agreed to dismiss the remaining counts, which would be considered for sentencing purposes. *Id.* The

terms of the plea agreement – in particular, the State's recommendation as to the length of Quarzenski's sentence – would later become the subject of dispute.

The attorney who had been appointed to represent Quarzenski on the third case recited the terms of the plea agreement at the plea hearing. App. A at 4. Regarding the State's sentencing recommendation as to all three cases, appointed counsel stated, "The state is to cap its recommendation on all three files combined at seven years. The defense is free to argue." *Id.* Quarzenski confirmed to the court that this also was his understanding; the State offered no objection or corrections. *Id.* The court approved the plea agreement, and accepted Quarzenski's guilty pleas. *Id.*

Prior to the plea hearing, Quarzenski signed two separate Wisconsin Plea Questionnaire/Waiver of Rights forms in connection with the agreement, one for the first two cases, and one for the third case. App. A at 3. On the first form, in the portion used for stating the terms of the plea agreement, the words "Cap at 7 years W.S.P." was written. *Id.* On the second form, the plea agreement was stated with the words "Plead to Cts. 2&3; all remaining counts to be dismissed and read in; state to cap recommendation at 7 years WSP. The defense is free to argue."

At the sentencing hearing, Quarzenski appeared with both retained and appointed counsel. However, a different assistant district attorney represented the

State. When the circuit court asked whether there was a plea agreement, the following exchange took place:

> Assistant District Attorney: Yes, your Honor. The state is recommending seven years [in] prison but is free to argue on how much extended supervision and/or probation on other counts.
>
> The Court: Okay.
>
> Appointed Defense Counsel: I believe that was a cap of seven years.
>
> Assistant District Attorney: Which is what I said, I thought.

App. A at 4. No further discussion took place regarding the terms of the plea agreement.

At the sentencing hearing, the State recommended seven years of initial confinement, followed by eight years of extended supervision and consecutive probation. *Id.* Neither retained nor appointed counsel objected. The circuit court adopted the State's position, and sentenced Quarzenski to seven years of confinement and eight years of extended supervision for the second-degree sexual assault, seven years of concurrent confinement and three years of extended supervision for the bail jumping, and four years of consecutive probation on the drug charges. *Id.* at 4-5.

B. Postconviction Proceedings

Represented by new counsel, Quarzenski moved for postconviction relief, alleging that the State had breached the plea agreement by seeking a total sentence beyond the seven years contained in the plea agreement, and that his trial counsel were ineffective for failing to object. The trial court conducted separate hearings at which retained counsel, appointed counsel, and Quarzenski testified.

Appointed counsel testified that Quarzenski's primary concern was the prospect of a lengthy period of confinement, and that the prospects of extended supervision and/or probation were not important to him. App. A at 5. According to appointed counsel, the cap at seven years "was a cap at prison, the actual confinement, not the total sentence."[1] Appointed

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[1] "Actual confinement" is a misnomer. When a Wisconsin inmate is released from the initial term of confinement, and has begun serving a term of extended supervision, he or she is subject to conditions which, if violated, can result in being returned to prison for to the full period of extended supervision:

> Section 973.01(2) provides that extended supervision constitutes a portion of a defendant's bifurcated sentence, and subsection (5) authorizes a court to impose conditions of extended supervision. When released to extended supervision, *the defendant remains in the legal custody of the department and is subject to return to prison for service of all or a portion of the remaining bifurcated sentence in the event the extended supervision is revoked.* Wis. Stat. § 302.113(8m)(a) and (9)(am). In short, extended supervision is part of the total sentence visited upon a defendant.

State v. Galvan, 2007 WI App 173, ¶ 11, 736 N.W.2d 890, 893-94 (emphasis supplied).

counsel stated that she did not believe that the prosecutor's sentencing recommendation was in breach of the agreement. *Id.*

Retained counsel testified that the "cap at 7 years WSP" language in the plea questionnaire meant the amount of "actual prison time" that the State would recommend and that the State was otherwise free to recommend probation or extended supervision beyond that. App. A at 6. Retained counsel likewise testified that he believed the State's sentencing recommendation conformed to the terms of the plea agreement. *Id.*

Quarzenski testified that his appointed counsel explained that "seven years" meant that the State would recommend a total of seven years and that the judge would be responsible for bifurcating the seven years into confinement time and extended supervision time. Second Postconviction Hearing Transcript Dated at 59-61. Quarzenski testified that he agreed with his appointed counsel's statement of the plea agreement at the plea hearing, but when the State recited the plea agreement at the beginning of the sentencing hearing, he whispered to her, "I thought this was supposed to be a total sentence of seven years." *Id.* at 65.

The trial court denied Quarzenski's motion for postconviction relief, ruling without comment that the agreement was unambiguous, and that the State had abided by the terms of the agreement. As a consequence, the trial court ruled that Quarzenski's

attorneys were not ineffective for failing to object to the State's sentencing recommendation.

Quarzenski appealed to the Wisconsin Court of Appeals, reiterating his claim that under Wisconsin sentencing law, the terms of the plea agreement clearly referred to a total sentence of seven years, including both initial confinement and extended supervision components. App. A at 7. In the alternative, Quarzenski argued that if the terms of the agreement were ambiguous, then the agreement must be construed against the State, and consistent with his reasonable understanding that the "seven years" referred to the total sentence, including confinement and supervision components. Appellant's brief at 9-11.

The Wisconsin Court of Appeals affirmed the trial court. Notably, the court of appeals did not agree that the terms of the plea agreement were unambiguous. Instead, the court of appeals interpreted the meaning of the plea agreement consistent with defense counsels' belief that the "seven years" was limited to the term of confinement only. App. A. at 7-10. The court of appeals placed no weight on Quarzenski's interpretation, the bifurcated sentencing scheme set forth under Wisconsin Statutes § 973.01, or on Wisconsin case law that supported Quarzenski's interpretation that a "total" sentence consisted of both a term of initial confinement and a term of extended supervision.

> The substantial period of confinement that Quarzenski faced lends credence to [appointed counsel's] testimony that Quarzenski was concerned only with the confinement portions of the sentences he would receive. Thus, the plea negotiations were conducted from that perspective and the ultimate agreement spoke only to that concern. Therefore, trial counsel had no basis to object when the State made its sentencing recommendation. As noted, we afford trial counsel's performance great deference, and examine the case from counsel's perspective at the time, and avoid determinations based on hindsight. Also as noted, when a circuit court's conclusions are based on the court's credibility findings, we accept those determinations. Here, although not expressly addressing the credibility of [appointed counsel's] and [retained counsel's] testimony, it is obvious that the court found both credible since the court ruled in favor of the State, which relied on their testimony.

App. A. at 7-10 (citations omitted).

Quarzenski filed a petition for discretionary review in the Wisconsin Supreme Court, requesting the court to consider whether due process requires ambiguous terms of a plea agreement to be construed against the State. The Wisconsin Supreme Court denied discretionary review in an order dated November 5, 2007. App. B.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVERSE THE DECISION OF THE WISCONSIN COURT OF APPEALS, AND ADOPT THE WELL-SETTLED RULE OF CONSTRUCTION THAT AMBIGUOUS TERMS IN PLEA AGREEMENTS SHOULD BE CONSTRUED IN FAVOR OF DEFENDANTS.

The present case involves a plea agreement in which the meaning of the most important term – the State of Wisconsin's recommendation as to length of the sentence – was in dispute. Under Wisconsin law, Quarzenski was subject to a bifurcated sentence of determinate length, consisting of a specific term of initial confinement followed by a specific term of extended supervision. According to Wisconsin law, the term "prison" comprises both portions of a bifurcated sentence.[2]

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[2] "Truth-In-Sentencing I" (TIS-I) was adopted in 1998 and created a new definition of "imprisonment in the Wisconsin state prisons" with regards to sentencing. See Wis. Stats. § 973.01; *see also State v. Cole*, 2003 WI 59, ¶ 16, 262 Wis.2d 167, 663 N.W.2d 700. TIS-I introduced determinate sentencing into Wisconsin, which abolished the old system of indeterminate sentencing and parole. *See State v. Crochiere*, 2004 WI 78, ¶ 7, 273 Wis.2d 57, 681 N.W.2d 524. TIS-I specifically provided that "whenever a court sentences a person to imprisonment in the Wisconsin state prisons . . . the court shall impose a bifurcated sentence that consists of a term of confinement in prison followed by a term of extended supervision. . . ." Wis. Stats. § 973.01(1). Furthermore, the statute provides that "the total length of the bifurcated sentence may not exceed the maximum period of imprisonment

(Continued on following page)

However, Quarzenski's attorneys and the prosecuting attorneys appeared to use the term "prison" to refer to the "initial confinement" portion of a sentence. The Wisconsin Court of Appeals disregarded the statutory definition of "prison," and Quarzenski's reasonable interpretation of that term, considered it to be ambiguous, and chose to construe the language in favor of the State.

Although neither this Court nor the Wisconsin Supreme Court have ever directly considered the issue, every federal circuit court of appeals and the appellate courts of virtually every state have adopted a rule of construction whereby ambiguous terms in plea agreements are construed against the government.

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for the felony." *Id.* § 973.01(2)(a). Therefore, under TIS-I, when a defendant is sentenced to X years of "imprisonment in the Wisconsin state prisons," X equals the total number of years the defendant will spend in confinement and extended supervision combined. *Cole*, 2003 WI 59, ¶ 16.

Even before TIS-I, the term "imprisonment" referred not only to the term of confinement a convicted felon served, but to the entire sentence – confinement plus any time spent on parole. *Grobarchick v. State*, 102 Wis.2d 461, 307 N.W.2d 170 (1981). In *Grobarchick*, the Wisconsin Supreme Court emphasized, "The phrase 'sentence of imprisonment' [as used in the sentencing statutes] does not mean 'term of confinement.' As employed in the language of the criminal law, a sentence of imprisonment is a term of incarceration or supervision on parole which continues until the defendant is finally discharged." *Grobarchick* at 468. Thus, based on the legal definitions of "imprisonment" and "Wisconsin state prisons," the prosecution was bound to recommend a total sentence of seven years, including both initial confinement and extended supervision.

These state and federal courts have universally considered the Due Process Clause as the basis for this rule, and relied heavily on this Court's teachings in *Santobello v. New York*, 404 U.S. 257 (1971) and *Mabry v. Johnson*, 467 U.S. 504 (1984). This Court should grant Quarzenski's petition for certiorari so that it can settle the question of whether due process requires ambiguous plea agreements to be construed in favor of the defendant. A decision from this Court would affirm the constitutional validity of the rule, promote uniformity among the States, and encourage prosecutors in every United States jurisdiction to exercise the utmost care in negotiating plea agreements.

It is well-settled that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257, 262 (1971). This is because "the conditions for a valid plea 'presuppose fairness in securing agreement between an accused and a prosecutor.'" *Mabry v. Johnson*, 467 U.S. 504, 509 (1984) (citing *Santobello* at 261). Consequently, where a prosecutor has breached a plea agreement, a defendant's due process rights are implicated, and he or she is entitled to an appropriate remedy. *Santobello* at 261-62; *see also Brady v. United States*, 397 U.S. 742, 748 (1970).

The question of whether a plea agreement has been breached necessarily hinges on the precise meaning of the terms of the plea agreement. If a

guilty plea "was induced by promises, *the essence of those promises must in some way be made known.*" *Santobello* at 261-62 (emphasis supplied). However, the "essence of those promises" is often the subject of dispute, and these disputes frequently involve the interpretation of ambiguous language contained within the plea agreement.

Both state and federal appellate courts have long applied general contract principles to the interpretation of plea agreements. *See, e.g., United States v. Papaleo*, 853 F.2d 16, 19 (1st Cir. 1988); *United States v. Alexander*, 869 F.2d 91, 95 (2d Cir. 1989); *United States v. Mooney*, 654 F.2d 482, 486 (7th Cir. 1981); *United States v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979); *People v. Barnett*, 113 Cal.App.3d 563, 571-72, 170 Cal.Rptr. 255, 259 (1980); *People v. Davis*, 94 Ill.App.3d 809, 811, 419 N.E.2d 724, 726 (1981); *State v. Yoon*, 662 P.2d 1112, 1116 (Haw. 1983); *Myers v. Frazier*, 173 W.Va. 658, 672, 319 S.E.2d 782, 796 (1984); *State v. Rivest*, 106 Wis.2d 406, 413, 316 N.W.2d 395, 399 (1982). However, where plea agreements contain ambiguous language or terms, federal appellate courts have *universally* recognized that general contract principles alone are insufficient in light of the due process concerns that are unique to plea agreements. In the oft-cited *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986), the Fourth Circuit set out the basic principles in support of a rule construing ambiguous terms against the defendant, and consistent with the reasonable belief of the defendant:

In the process of determining whether disputed plea agreements have been formed or performed, courts have necessarily drawn on the most relevant body of developed rules and principles of private law, those pertaining to the formation and interpretation of commercial contracts. But the courts have recognized that those rules have to be applied to plea agreements with two things in mind which may require their tempering in particular cases. First, the defendant's underlying "contract" right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law. Second, with respect to federal prosecutions, the courts' concerns run even wider than protection of the defendant's individual constitutional rights – to concerns for the "honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government."

. . . . Private law interpretive principles may be wholly dispositive in an appropriate case. For example, whether a written agreement is ambiguous or unambiguous on its face should ordinarily be decided by the courts as a matter of law. *If it is unambiguous as a matter of law, and there is no suggestion of government overreaching of any kind, the agreement should be interpreted and enforced accordingly. . . .*

> *On the other hand, both constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements.* This is particularly appropriate where, as will usually be the case, the Government has proffered the terms or prepared a written agreement – for the same reasons that dictate that approach in interpreting private contracts.
>
> As a necessary corollary, derelictions on the part of defense counsel that contribute to ambiguities and imprecisions in plea agreements may not be allowed to relieve the Government of its primary responsibility for insuring precision in the agreement. . . . Unlike the private contract situation, the validity of a bargained guilty plea depends finally upon the voluntariness and intelligence with which the defendant – and not his counsel – enters the bargained plea. This necessary condition to effective waiver of constitutional rights can be found wanting not only because of the Government's derelictions in discharging its duty of fair bargaining, but also because of any independent (as well as Government-induced) dereliction of defense counsel amounting to ineffective assistance of counsel.

Harvey, 791 F.2d at 300-01 (internal citations omitted; emphasis supplied).

Based on this reasoning, every federal court of appeals has ruled that ambiguities in plea agreements should be construed against the government, and in accordance with the defendant's reasonable understanding of the agreement. *United States v. Giorgi*, 840 F.2d 1022, 1026 (1st Cir. 1988); *United States v. Ready*, 82 F.3d 551, 558-59 (2d Cir. 1996); *United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000); *Harvey*, *supra* at 300; *United States v. Sibley*, 448 F.3d 754, 759 (5th Cir. 2006); *United States v. Harris*, 473 F.3d 222, 225 (6th Cir. 2006); *Carnine v. United States*, 974 F.2d 924, 928-29 (7th Cir. 1992); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003); *United States v. De la Fuente*, 8 F.3d 1333, 1337-38, n.7 and n.8 (9th Cir. 1993); *United States v. Cachucha*, 484 F.3d 1266, 1270 (10th Cir. 2007); *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990).

The vast majority of states have applied the same rule where plea agreements contain ambiguous terms or language. *Humphrey v. State*, 686 So.2d 560, 562 (Ala.Cr.App. 1996); *People v. Toscano*, 124 Cal.4th 340, 345 (2004); *State v. Rivers*, 283 Conn. 713, 725, 931 A.2d 185, 193 (2007) (collecting cases); *Louis v. United States*, 862 A.2d 925, 928 (D.C. 2004); *State v. Smith*, 639 So.2d 1054 (Fla.App. 1994); *State v. Abbott*, 79 Haw. 317, 901 P.2d 1296 (Haw.App. 1995); *State v. Cole*, 135 Idaho 269, 272, 16 P.3d 945, 948 (Idaho App. 2000); *State v. Wills*, 244 Kan. 62, 69, 765 P.2d 1114 (1988); *Elmore v. Com.*, 236 S.W.3d 623 (Ky.App. 2007); *Solorzano v. State*, 397 Md. 661, 919

A.2d 652 (2007); *State v. Witte*, 308 Minn. 214, 216, and n.2, 245 N.W.2d 438, 439, and n.2 (1976) (en banc) (per curiam) (collecting cases); *State v. Jones*, 789 S.W.2d 856, 858 (Mo.App. S.D. 1990); *State v. Howe*, 2 Neb. Ct. App. 766, 778, 514 N.W.2d 356, 365 (1994); *State v. Mares*, 119 N.M. 48, 51, 888 P.2d 930 (1994); *State v. Bethel*, 110 Ohio St. 3d 416, 424, 854 N.E.2d 150, 167 (2006) (citing *United States v. Johnson*, 979 F.2d 396, 399 (6th Cir. 1992); *State v. Bisson*, 156 Wash.2d 507, 517, 130 P.3d 820, 825 (2006); *State ex rel. Forbes v. Kaufman*, 185 W.Va. 72, 77, 404 S.E.2d 763, 768 (1991); *Clingman v. State*, 23 P.3d 27, 31, 2001 WY 46 (Wyo. 2001) (adopting the rule of the 10th Circuit in *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1264 (10th Cir. 1999)).

However, no Wisconsin court has ever reached the question of how to construe ambiguous terms in plea agreements. The closest any Wisconsin court has come to the issue is in *State v. Windom*, 169 Wis.2d 341, 485 N.W.2d 832 (Ct.App. 1992). Windom pleaded guilty to a burglary charge in exchange for the State's promise not to make a sentencing recommendation to the court. *Id.* at 344. The State honored the agreement, and the court withheld sentencing, and placed Windom on probation for three years. *Id.* While still on probation, Windom was charged with armed robbery and was subsequently sentenced to five years of prison. *Id.* at 345. As a result, Windom's probation was revoked, and at sentencing, the State recommended that any sentence for the burglary charge be served consecutively to the armed robbery sentence.

Id. On appeal, Windom contended that the plea agreement was ambiguous because it did not specify whether the State was required to keep its agreement at the initial sentencing or at a subsequent sentencing after revocation. *Id.* at 346. Windom argued that the ambiguity of this aspect of the plea agreement should be construed against the State, and he sought resentencing consistent with the State's original agreement to stand silent as to its recommendation. The court of appeals, however, found that the plea agreement was not ambiguous because the term "sentencing" was limited to the hearing at which Windom initially received probation. *Id.* at 349. Thus, the *Windom* court never reached the issue of how to construe ambiguous terms contained in the plea agreement.

This Court has also never directly addressed this issue. In *Ricketts v. Adamson*, 483 U.S. 1 (1987), this Court considered whether the Double Jeopardy Clause barred the first-degree murder prosecution of a defendant after a defendant's breach of his plea agreement. The case involved the highly publicized 1976 car-bombing death of Donald Bolles, a reporter for the Arizona Republic. Adamson had been implicated in the bombing; he entered into a plea agreement in which he would receive a reduced charge of second-degree murder and an actual incarceration time of 20 years and two months in exchange for his cooperation and trial testimony against his co-actors. *Adamson* at 4. The co-actors were convicted, and Adamson was sentenced in accordance with the plea

agreement. *Id.* However, the Arizona Supreme Court later reversed the co-actors' convictions and remanded for retrial. *Id.* The State of Arizona again sought Adamson's cooperation and testimony, but Adamson informed the prosecutor that he believed his obligation under the plea agreement had been satisfied, and would only cooperate if additional conditions were met, including Adamson's release from custody after testifying at the second trial. *Id.* The prosecutor deemed Adamson's demands to be in breach of the agreement, and reinstated the original charges of first-degree homicide. *Id.* at 5. Adamson unsuccessfully sought interlocutory relief in Arizona and federal courts. *Id.* at 5-7, and was eventually tried and convicted of first-degree murder and sentenced to death. *Id.* at 7.

This Court described the subsequent procedural history of Adamson's post-conviction efforts as follows:

> The judgment was affirmed on direct appeal, and we denied certiorari. Respondent sought federal habeas corpus for the second time, asserting a number of claims relating to his trial and sentence. The District Court dismissed the petition; a Court of Appeals panel affirmed. The Court of Appeals went en banc, held that the State had violated respondent's rights under the Double Jeopardy Clause, and directed the issuance of a writ of habeas corpus. The en banc opinion reasoned that respondent had not waived his double jeopardy rights by entering into the plea agreement,

> asserting that "[i]t may well be argued that the only manner in which [respondent] could have made an intentional relinquishment of a known double jeopardy right would be by waiver 'spread on the record' of the court after an adequate explanation." Even if double jeopardy rights could be waived by implication, no such waiver occurred here since "[a]greeing that charges may be reinstituted under certain circumstances is not equivalent to agreeing that if they are reinstituted a double jeopardy defense is waived." Finally, the court stated that even were the agreement read to waive double jeopardy rights impliedly, no waiver was effected here because a "defendant's action constituting the breach must be taken with the knowledge that in so doing he waives his double jeopardy rights." Because there was a "reasonable dispute as to [respondent's] obligation to testify," the court continued, "there could be no knowing or intentional waiver until his obligation to testify was announced by the court." The dissenting judges emphasized that respondent's refusal to testify triggered the second prosecution and the Double Jeopardy Clause "'does not relieve a defendant from the consequences of his voluntary choice.'" We granted the State's petition for a writ of certiorari to review the Court of Appeals' decision that the Double Jeopardy Clause barred prosecution of respondent for first-degree murder.

Adamson at 7-8 (internal citations omitted).

This Court granted certiorari, and reversed the decision of the Ninth Circuit, holding that Adamson had knowingly waived his double jeopardy rights.

> [W]e do not find it significant, as did the Court of Appeals, that "double jeopardy" was not specifically waived by name in the plea agreement. Nor are we persuaded by the court's assertion that "[a]greeing that charges may be reinstituted . . . is not equivalent to agreeing that if they are reinstituted a double jeopardy defense is waived." *The terms of the agreement could not be clearer*: in the event of respondent's breach occasioned by a refusal to testify, the parties would be returned to the status quo ante, in which case respondent would have no double jeopardy defense to waive. And, an agreement specifying that charges may be reinstated given certain circumstances is, at least under the provisions of this plea agreement, precisely equivalent to an agreement waiving a double jeopardy defense.

Adamson at 9-10 (internal citations omitted; emphasis supplied).

The majority opinion in *Adamson* did not reach the issue of whether the plea agreement was ambiguous. Indeed, in a footnote, this Court specifically declined to review the Arizona Supreme Court's construction of the language of the plea agreement:

> We will not second-guess the Arizona Supreme Court's construction of the language of the plea agreement. While we assess independently

> the plea agreement's effect on respondent's double jeopardy rights, *the construction of the plea agreement and the concomitant obligations flowing therefrom are, within broad bounds of reasonableness, matters of state law, and we will not disturb the Arizona Supreme Court's reasonable disposition of those issues.* The dissent's discourse on the law of contracts is thus illuminating but irrelevant. The questions whether the plea agreement obligated the respondent to testify at the retrial of Dunlap and Robison and, if so, whether the respondent breached this duty are matters appropriately left to the state courts.

Adamson at 5, n.3 (emphasis supplied). However, in a lengthy dissent joined by Justice Marshall, Justice Blackmun, and Justice Stevens, Justice Brennan focused particular attention on the due process concerns that distinguish plea agreements from other forms of contracts, and which therefore require additional safeguards:

> This Court has yet to address in any comprehensive way the rules of construction appropriate for disputes involving plea agreements. Nevertheless, it seems clear that the law of commercial contract may in some cases prove useful as an analogy or point of departure in construing a plea agreement, or in framing the terms of the debate. It is also clear, however, that commercial contract law can do no more than this, because plea agreements are constitutional contracts. *The values that*

> *underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause, and that govern relations between criminal defendants and the State. Unlike some commercial contracts, plea agreements must be construed in light of the rights and obligations created by the Constitution.*

Adamson at 16 (Brennan, J., dissenting) (citations omitted; emphasis supplied). The dissent went beyond general due process concerns in plea agreements, and asserted that that a defendant has a constitutional right to rely on a reasonable, good-faith interpretation of an ambiguous plea agreement:

> Of course, far from being a commercial actor, Adamson is an individual whose "contractual" relation with the State is governed by the Constitution. The determination of Adamson's rights and responsibilities under the plea agreement is controlled by the principles of fundamental fairness imposed by the Due Process Clause. To grant to one party – here, the State – the unilateral and exclusive right to define the meaning of a plea agreement is patently unfair. Moreover, such a grant is at odds with the basic premises that underlie the constitutionality of the plea-bargaining system. Guilty pleas are enforceable only if taken voluntarily and intelligently. It would be flatly inconsistent with these requirements to uphold as intelligently made a plea agreement which provided that,

> in the future, the agreement would mean whatever the State interpreted it to mean. Yet the Court upholds today the equivalent of such an agreement. *The logic of the plea-bargaining system requires acknowledgment and protection of the defendant's right to advance against the State a reasonable interpretation of the plea agreement.*

Adamson at 16 (Brennan, J., dissenting) (citations omitted).

The present case places this issue front and center before the Court. The Wisconsin Court of Appeals considered the terms of the plea agreement to be ambiguous. In resolving that ambiguity, however, the court of appeals placed no weight whatsoever on the plain language included in the plea questionnaires or stated in the record, and ignored the legal significance of that language and Quarzenski's reasonable interpretation of it. Instead, the court of appeals relied solely on the postconviction testimony of trial counsel, and construed the ambiguous agreement in favor of the State of Wisconsin.

In so doing, the Wisconsin Court of Appeals essentially delegated to *counsel* the authority to determine key provisions of the plea agreement. This directly undermines the validity of the plea, because it is the defendant – not defense counsel, and not the prosecution – who is giving the fundamental right to trial. More importantly, in a justice system in which the overwhelming majority of criminal cases are resolved with negotiated guilty pleas, it is incumbent

upon this Court to establish a rule of construction that comports with the Due Process Clause. Given the complexities of language, life, and the law, ambiguous plea agreements may be inevitable. As demonstrated by this case, however, a constitutionally-based rule would go a long way to resolving such ambiguities after they occur, and preventing them before they occur.

CONCLUSION

For the reasons stated, this Court should grant the Petition for Writ of Certiorari.

Dated at Milwaukee this 25th day of March, 2008.

Respectfully submitted,

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APPENDIX A

2007 WI APP 212

COURT OF APPEALS OF WISCONSIN PUBLISHED OPINION

Case Nos.: 2006AP2509
2006AP2510
2006AP2511

†Petition for Review filed

Complete Title of Case:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID C. QUARZENSKI,

DEFENDANT-APPELLANT.†

Opinion Filed: August 22, 2007
Submitted on Briefs: May 24, 2007

JUDGES: Brown, C.J., Anderson, P.J., and Nettesheim, J.

Concurred:
Dissented:

Appellant
ATTORNEYS: On behalf of the defendant-appellant, the cause was submitted on the briefs of *Martin E. Kohler*, and *Christopher M. Eippert*, of *Kohler & Hart, LLP* of Milwaukee.

Respondent
ATTORNEYS: On behalf of the plaintiff-respondent, the cause was submitted on the brief of *J.B. Van Hollen*, attorney general, and *Thomas J. Balistreri*, assistant attorney general.

Cir. Ct. Nos. 2000CF371
2001CF137
2001CF180

APPEAL from judgments and orders of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Nettesheim, J .

¶1 NETTESHEIM, J. Pursuant to a plea bargain, David C. Quarzenski agreed to plead guilty to multiple charges, and the State agreed to cap its sentencing recommendation at seven years. At the sentencing hearing, the State made its promised recommendation, but additionally asked the circuit court to impose periods of extended supervision and probation on certain of the charges. Quarzenski contends that this constituted a breach of the plea agreement and that his multiple counsel were ineffective by failing to object to the breach.

¶2 Based on the evidence presented at the ***Machner***[1] hearing, we conclude that the parties' plea agreement regarding the State's sentencing recommendation was targeted at the period of Quarzenski's confinement, not other potential components of the sentences. Therefore, the State did not breach the plea agreement, and trial counsel were not ineffective for failing to object. We affirm the judgments of conviction and the orders denying postconviction relief.

BACKGROUND

¶3 In circuit court case number 2000CF371, the State charged Quarzenski with possession with intent to distribute marijuana and possession of drug paraphernalia pursuant to WIS. STAT. §§ 961.41(1m)(h)1. and 961.573(1) (2005-06).[2] While that case was pending, Quarzenski was arrested and charged in case number 2001CF137 with delivery of marijuana pursuant to § 961.41(1)(h)1. and two counts of bail jumping pursuant to WIS. STAT. § 946.49(1)(b). Quarzenski retained Attorney Patrick K. Cafferty to represent him on these two cases ("the Cafferty cases").

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[1] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 A month later, the State filed further charges against Quarzenski in case number 2001CF180. The ensuing information charged Quarzenski with delivery of a controlled substance to a minor pursuant to WIS. STAT. § 961.41(1)(h)1. and § 961.46(3) (1999-2000), possession of marijuana pursuant to § 961.41(3g)(e), three counts of second-degree sexual assault pursuant to WIS. STAT. § 940.225(2)(a), and five counts of bail jumping pursuant to WIS. STAT. § 946.49(1)(b). The state public defender appointed Attorney Jenelle Glasbrenner to represent Quarzenski on this third case ("the Glasbrenner case").

¶5 Quarzenski faced over a century and a half of potential sentences on all of the charges. In July 2001, the parties negotiated a global plea agreement by which Quarzenski would plead guilty to one count of possession with intent to deliver 500 grams or less of a controlled substance (THC), one count of delivery of 500 grams or less of a controlled substance (THC), one count of violation of the terms of his bond by possession of illegal drugs, and one count of second-degree sexual assault. The State agreed to dismiss, but read in, the remaining counts, which would be considered for sentencing purposes. In addition, the State agreed to cap its sentencing recommendation at seven years.

¶6 Quarzenski signed two Plea Questionnaire/ Waiver of Rights forms in connection with the agreement, one for "the Cafferty cases" and one for "the Glasbrenner" case. The "Voluntary Plea" portion of

the plea questionnaire for "the Cafferty cases" stated: "Cap at 7 years W.S.P."[3] That portion of the questionnaire in "the Glasbrenner" case stated: "Plead to Cts. 2 & 3; all remaining counts to be dismissed and read in; state to cap recommendation at 7 years WSP; [defendant] free to argue."

¶7 At the plea hearing Glasbrenner recited the terms of the plea agreement. Regarding the State's sentencing recommendation, Glasbrenner stated, "The state is to cap its recommendation on all three files combined at 7 years. The defense is free to argue." Quarzenski confirmed to the circuit court that this also was his understanding. The State offered no objection or corrections. The court approved the plea agreement, accepted Quarzenski's guilty pleas, and ordered the department of corrections to submit a presentence report.

¶8 At the sentencing hearing, Quarzenski appeared with both Cafferty and Glasbrenner. However, a different assistant district attorney represented the State. The following colloquy ensued when the circuit court asked whether there was a plea agreement:

> [ASSISTANT D.A.]: Yes, your Honor. The state is recommending 7 years [in] prison but is free to argue on how much extended supervision and/or probation on other counts.

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[3] Cafferty testified that the "W.S.P." designation referred to the Wisconsin State Prisons.

THE COURT: Okay.

MS. GLASBRENNER: I believe that was a cap of 7 years.

[ASSISTANT D.A.]: Which is what I said, I thought.

No further discussion regarding the terms of the plea agreement occurred.

¶9 In its sentencing statement, the State recommended seven years' confinement, but additionally asked for an extensive period of extended supervision and consecutive long-term probation. Neither Cafferty nor Glasbrenner objected to this sentencing request. The circuit court adopted the State's position, sentencing Quarzenski to seven years' confinement and eight years' extended supervision for the second-degree sexual assault, seven years' concurrent confinement and three years' extended supervision for the bail jumping, and four years of consecutive probation on the drug charges under withheld sentences.[4]

¶10 Represented by new counsel, Quarzenski moved for postconviction relief pursuant to WIS. STAT. § 974.06. Quarzenski alleged that the State had breached the plea agreement by seeking extended supervision and probation beyond the seven-year

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[4] The presentence report recommended twelve to fifteen years' confinement followed by eight to ten years of extended supervision.

request for confinement and that his trial counsel were ineffective for failing to object.

¶11 The circuit court conducted separate ***Machner*** hearings at which Glasbrenner and Cafferty respectively testified. Glasbrenner testified that the "extensive" negotiations with the State focused on Quarzenski's potential prison time because Quarzenski "didn't care about extended supervision. He didn't care about probation. His primary goal was to limit the amount of time he spent in prison." The cap at seven years "was a cap at prison, the actual confinement, not the total sentence."

¶12 Shown a letter she sent to the state public defender's office stating that Quarzenski's sentence may present "arguably meritorious issues for appeal," Glasbrenner testified that the terminology in her letter was "standard language," and she felt an appellate challenge to the sentence "would be the only place to look." She harbored some doubts as to the sexual assault victim's credibility and so subjectively felt the court's sentence was harsh, but nonetheless was proper under the law and the agreement. Glasbrenner testified that if she believed the State had incorrectly stated the plea agreement she would have objected, as she has done with other clients.

¶13 Cafferty testified that the "cap at 7 years WSP" language in the plea questionnaire in "the Cafferty cases" meant the amount of actual prison time that the State would recommend and that the State was otherwise free to recommend probation or

extended supervision beyond that. Cafferty testified he had no cause to object because he believed the State's sentencing recommendation conformed to the parties' agreement.

¶14 The circuit court denied Quarzenski's motion for postconviction relief, ruling that the State had abided by the agreement and therefore Quarzenski's attorneys were not ineffective for failing to object to the State's sentencing recommendation. Quarzenski appeals.[5]

DISCUSSION

The Law of Ineffective Assistance of Counsel

¶15 We analyze a claim of ineffective assistance of counsel under the two-part test articulated in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A defendant must satisfy both parts – deficient performance and resultant prejudice. ***Id.***; ***State v. Taylor***, 2004 WI App 81, ¶¶ 13-14, 272 Wis. 2d 642, 679 N.W.2d 893. To prove deficient performance, the defendant must identify counsel's specific acts or omissions that fall "outside the wide range of professionally competent assistance." ***Strickland***, 466 U.S. at 690. To prove prejudice, the defendant must show that the errors were so serious that the result of the proceeding was unreliable. ***Id.*** at 687. If the State

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[5] This court granted Quarzenski's motion to consolidate the three cases for appeal.

substantially and materially breaches a plea agreement, prejudice is presumed because it results in a manifest injustice to the defendant. *See* ***State v. Smith***, 207 Wis. 2d 258, 281, 558 N.W.2d 379 (1997).

¶16 On review, we afford trial counsel's performance great deference, examine the case from counsel's perspective at the time, and make every effort to avoid determinations based on hindsight. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Quarzenski bears the burden to defeat the strong presumption that counsel acted reasonably within professional norms. *See* ***id.***

Material and Substantial Breach

¶17 Quarzenski contends that the State's agreement to cap its sentencing recommendation at seven years meant just that – a total sentencing package, regardless of the sentencing components, that would not exceed seven years. By asking for extended supervision and probation that extended beyond that limitation, Quarzenski contends the State materially and substantially breached the agreement. From this premise, Quarzenski maintains that both his trial counsel provided ineffective assistance when they did not object to that breach.

¶18 The issue of whether Quarzenski's trial counsel were ineffective depends on whether the State's sentencing recommendation constituted a material and substantial breach of the party's plea agreement. *See* ***Smith***, 207 Wis. 2d at 281. A material

and substantial breach violates the terms of the agreement so as to defeat the benefit for which the accused bargained. ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. Only a material and substantial breach is actionable, *see* ***id.***; counsel cannot have rendered ineffective assistance for not objecting to a technical breach or to none at all, *see* ***State v. Howard***, 2001 WI App 137, ¶¶14-15, 21, 246 Wis. 2d 475, 630 N.W.2d 244; and "manifest injustice" results from a material and substantial breach, *see* ***Smith***, 207 Wis. 2d at 281.

¶19 The terms of a plea agreement and the historical facts of the State's conduct that allegedly constitute a breach of a plea agreement are questions of fact. ***Williams***, 249 Wis. 2d 492, ¶2. But whether the State's conduct constitutes a breach of the plea agreement and, if so, whether such breach was material and substantial, are questions of law that we review de novo. ***State v. Naydihor***, 2004 WI 43, ¶11, 270 Wis. 2d 585, 678 N.W.2d 220. To the extent the circuit court's conclusions are rooted in the witnesses' credibility, we will accept those determinations. ***Jacobson v. American Tool Cos., Inc.***, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998). If the court does not make express findings in that regard, we assume it made implicit findings on a witness's credibility when analyzing the evidence. ***Id.***

¶20 Quarzenski argues that the plea questionnaires stating a seven-year cap, Glasbrenner's recitation of this provision at the plea hearing, and her reaction to the prosecutor's request for extended

supervision and probation at the sentencing hearing bear out his contention that the global agreement contemplated a total sentence of seven years. He also maintains that since he was sentenced under Truth-in-Sentencing I (TIS-I), the plea agreement of seven years had to mean a seven-year total sentence on the three cases combined because under TIS-I he believes "any reference to a prison sentence or a sentence in general means a *total* sentence, including both confinement and extended supervision."[6]

¶21 The thrust of the testimony given by Glasbrenner and Cafferty at the ***Machner*** hearing was similar. Glasbrenner testified that Quarzenski's primary concern was the prospect of a lengthy period of incarceration and that the prospects of extended supervision and/or probation were not important to him. Thus, the plea negotiations were conducted from that perspective. After the plea bargain was struck, Glasbrenner understood that the seven-year cap applied to only the confinement portion of the sentences. Moreover, Glasbrenner testified that if the State's sentencing-cap promise was intended to cover all facets of the potential sentences, she would have objected to the State's sentencing recommendation.

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[6] TIS-I applies to offenses committed between December 31, 1999, and January 31, 2003. ***State v. Sutton***, 2006 WI App 118, ¶3 n.4, 294 Wis. 2d 330, 718 N.W.2d 146, *review denied*, 2006 WI 113, 296 Wis. 2d 63, 721 N.W.2d 486.

¶22 Cafferty testified that the "cap at 7 years W.S.P." language in the plea questionnaire on "the Cafferty cases" referred to the actual prison time that Quarzenski would serve and that the State was otherwise free to argue for additional extended supervision or probation. Like Glasbrenner, Cafferty testified that he had no cause to object because he viewed the State's recommendation as being in keeping with the plea agreement.

¶23 The circuit court held that the State abided by the plea agreement and therefore trial counsel were not ineffective for failing to object. We agree. The substantial period of confinement that Quarzenski faced lends credence to Glasbrenner's testimony that Quarzenski was concerned only with the confinement portions of the sentences he would receive. Thus, the plea negotiations were conducted from that perspective and the ultimate agreement spoke only to that concern. Therefore, trial counsel had no basis to object when the State made its sentencing recommendation. As noted, we afford trial counsel's performance great deference, and examine the case *from counsel's perspective at the time,* and avoid determinations based on hindsight. ***Johnson,*** 153 Wis. 2d at 127. Also as noted, when a circuit court's conclusions are based on the court's credibility findings, we accept those determinations. ***Jacobson,*** 222 Wis. 2d at 390. Here, although not expressly addressing the credibility of Glasbrenner's and Cafferty's testimony, it is obvious that the court found both credible since the court ruled in favor of the State, which relied on their

testimony. If the court does not make express findings on credibility, we assume it made implicit findings to that effect when analyzing the evidence. ***Id.*** We see no basis for disturbing the circuit court's determinations. The State did not breach the plea agreement, and therefore trial counsel were not ineffective for failing to object to the State's sentencing recommendation.

¶24 Trial counsel's testimony at the ***Machner*** hearing also refutes Quarzenski's reliance on TIS-1. Quarzenski points to the language of WIS. STAT. § 973.01(2) which states:

> A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision under [WIS. STAT. §] 302.113. The total length of a bifurcated sentence equals the length of the term of confinement in prison plus the length of the term of extended supervision.

Based on this language, Quarzenski contends that the references in the plea questionnaires to "Cap at 7 years W.S.P." and "state to cap recommendation at 7 years WSP" contemplated the total bifurcated sentences. But the ***Machner*** testimony of both Cafferty and Glasbrenner clearly explained that these references were addressed to only the confinement portion of the sentences. In short, Quarzenski was not concerned about the prospects of extended supervision and/or probation and, as a result, the plea agreement did not address those matters.

¶25 Alternatively, Quarzenski argues that even if his attorneys were not ineffective, "the State's breach of the plea agreement still resulted in manifest injustice" to him, entitling him to resentencing by a different judge. However, this argument is premised on the existence of a breach by the State – a premise we have already rejected. We deny Quarzenski's alternative request for resentencing.

CONCLUSION

¶26 Because the State did not breach the plea agreement, Quarzenski's trial counsel had no basis for objecting to the State's sentencing recommendation. Therefore, trial counsel were not ineffective. We affirm the judgments of conviction and the orders denying postconviction relief.

By the Court. – Judgments and orders affirmed.

APPENDIX B

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Supreme Court of Wisconsin

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You are hereby notified that the Court has entered the following order:

No.	2006AP2509	*State v. Quarzenski* L.C. #s
thru	2006AP2511	2000CF371/2001CF137&180

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, David C. Quarzenski, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

David R. Schanker
Clerk of Supreme Court